Filed 2/14/03; Appendix not available electronically

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BURGIN CLARK, a Minor, etc., et al., Plaintiffs and Respondents, v. FAIR OAKS RECREATION AND PARK DISTRICT, Defendant, Cross-Complainant and Appellant, COLUMBIA CASCADE, Defendant, Cross-Defendant and Respondent.	C038830 (Super. Ct. No. 99AS04437)

APPEAL from a judgment of the Superior Court of Sacramento County, Trena H. Burger-Plavan, J. Affirmed.

Bailey & Brown, and William J. Schmidt for Defendant, Cross-complainant and Appellant.

Moseley C. Collins, III for Plaintiffs and Respondents.

Stevens, Drummond & Gifford and Gary T. Drummond for Defendant, Cross-defendant and Respondent.

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* Pursuant to rules 976(b) and 976.1 of the California Rules of Court, all portions of this opinion, including the Appendix, shall be published except for parts II through V, inclusive of the DISCUSSION.

Plaintiff Burgin Clark, aged 10, broke his leg in an accident on playground equipment owned by defendant Fair Oaks Recreation and Park District (the District) and manufactured by defendant Columbia Cascade. Through his guardian ad litem, Ruth Gothier, plaintiff sued the District, alleging a dangerous condition of public property, and Columbia Cascade, alleging strict liability for design defect.[1] The District cross-complained against Columbia Cascade for equitable indemnity.

After a bench trial in which all parties put on expert testimony as to how plaintiff's injury occurred and how to

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[1] Government Code section 835 states in part: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . .

"[¶] . . . [¶]

"[] The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Government Code section 830 states in part: "As used in this chapter:

"(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used.

"(b) 'Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition."

All further undesignated section references are to the Government Code.

interpret the legal safety standards for playground equipment, the trial court found for plaintiff against the District, but not against Columbia Cascade. (We give the substance of the court's legal conclusions below as relevant to the District's claims of error.) The court awarded damages of $87,264.70 against the District, including economic damages of $24,764.70 and non-economic damages of $62,500. The court also found in favor of Columbia Cascade on the District's indemnity cross-complaint.

The District contends it had absolute immunity under section 831.7; plaintiff assumed the risk of his accident; and the kind of injury that occurred was not reasonably foreseeable. It also contends plaintiff's evidence of medical damages was improperly admitted. Finally, it contends (joined on this point by plaintiff) that if the trial court correctly found it liable based on a defective design that caused injury, it could not properly fail to hold Columbia Cascade strictly liable for the design defect.

In the published portion of the opinion, we conclude the District has not satisfied its burden of proving the affirmative defense of absolute immunity under section 831.7. In the unpublished portion of the opinion, we reject the remaining attacks on the judgment. We shall therefore affirm the judgment.

FACTS

As the District does not overtly claim the evidence is insufficient to support the trial court's findings, we recite the facts most favorably to the judgment, drawing largely on the court's statement of decision.

The District owns and maintains eight parks with playgrounds, including Village Park. In 1988, Village Park acquired a piece of playground equipment manufactured by Columbia Cascade; the District installed it according to the manufacturer's instructions and did not subsequently modify it in any way. The equipment consisted of several different types of apparatus joined together, including platforms, swings, a tire swing, a slide, and an arch climber leading up to one of the platforms.[2] A photograph of the arch climber is attached as Appendix A, *post*.

An arch climber is an apparatus made up of convex side supports, rungs, and open spaces between the rungs; it curves as it ascends. Children are expected to use all four limbs to go up and down it, as it has no handrails. Before February 23, 1999, there had not been an accident on the arch climber in Village Park, so far as the District's employees knew.

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[2] The statement of decision calls it an "arched climber." However, the parties, the manufacturer's invoice, and the federal Consumer Product Safety Commission (CPSC) guidelines say "arch climber."

In 1981, the CPSC issued guidelines on playground equipment, published under the title "Handbook for Public Playground Safety." They prescribed that the spaces between the top surfaces of adjacent rungs of an arch climber should be at least seven inches and not more than 11 inches apart. This rule was meant to avoid the danger of entrapment, particularly the entrapment of a child's head between rungs. However, if a "head probe" could not penetrate between rungs to a depth of at least four inches, the danger of head entrapment was minimal. Because the head probe test showed that the spaces between the rungs of the Village Park arch climber could not be penetrated to that depth, it complied with the 1981 guidelines.

In 1991, the CPSC issued a revised "Handbook for Public Playground Safety" with new guidelines, reissued without relevant change in 1997. The 1991 guidelines provide that to prevent entrapment, defined as "[a]ny condition that impedes withdrawal of a body or body part that has penetrated an opening," rung spacing on arch climbers should follow the recommendations for rung ladders. These state that spaces between rungs should not be between three and one-half inches and nine inches (i.e., they should be less than three and one-half inches apart or more than nine inches apart). The rungs on the Village Park arch climber measured four and one-half inches apart. Thus they did not comply with the 1991 guidelines.[3]

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[3] The trial court drew these conclusions after weighing lengthy expert testimony about the guidelines. The court did not entirely accept any of the experts' opinions.

In 1995, the Legislature enacted Health and Safety Code sections 115725 and 115730. Health and Safety Code section 115725 required the state to adopt regulations for public playgrounds that "shall meet the standard of care imposed by courts of law on playground operators, and shall, at a minimum, impose guidelines and criteria that shall be at least as protective as the guidelines in the Handbook for Public Playground Safety produced by the [CPSC] . . . ." Health and Safety Code section 115730 required public entities to upgrade their playgrounds to satisfy the new regulations, so far as state funding was available for this purpose.

Plaintiff's expert on this topic, Emelyn Kalinowski, opined that the arch climber did not comply with either the 1981 or the 1991 guidelines.

The District's expert on this topic, Jay Beckwith, opined that the relevant language of both guidelines dealt only with *head* entrapment; the arch climber either complied with the standard in that respect or was not dangerously out of compliance. Beckwith conceded, however, that he had testified in deposition he did not disagree with the conclusion drawn by District employee Rodney Melton that the arch climber posed a life-threatening hazard and should have been removed. (See *post*.) Beckwith, who was in the business of designing and selling playground equipment, also admitted he had knowingly sold equipment that violated the guidelines. He preferred "variety" in playground equipment, even if it rendered the equipment noncompliant, to uniformity.

Columbia Cascade's expert, Teresa Hendy, opined that the arch climber complied with the 1981 guidelines, but not with the 1991 guidelines for head entrapment. She did not think it was a life-threatening violation; however, she did not fault District employee Melton for concluding otherwise, given his level of knowledge, and she conceded it could have caused injury. But she did not think the manner in which plaintiff was injured (slipping and falling) came within the guidelines' concern.

On October 12, 1998, District Park Supervisor Rodney Melton, a certified playground inspector, performed a safety audit of Village Park's equipment. He immediately reported to his superior, Superintendent Bill Hinson (also a certified playground inspector), both orally and in writing, that he had found many violations of the 1991 CPSC guidelines that could cause life-threatening or permanently disabling accidents ("priority one" hazards), including the risk of entrapment from the improper spacing between the rungs of the arch climber.[4] Melton recommended the equipment be removed as soon as possible. Hinson concurred. However, although he had the authority to remove a portion of a structure, such as an arch climber, on his

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[4] Melton's written report shows 11 "priority one" guideline violations, two "priority twos" (risk of serious or non-disabling injury), and one "priority three" (risk of slight injury, if any). It lists the arch climber twice, both times as a priority one hazard. Under "General Hazards[:] Pinch, Crush and Shearing Points," it states: "Arched ladder can cause entrapment." (There is a separate listing for "Head Entrapment" under this heading, which does not mention the arch climber.) Under "Stairways and [L]adders[:] Entrapment - Head & Body," it states: "Head entrapment is possible in the arch ladder/climber."

At trial, Melton testified that he understood the arch climber hazard to be only *head* entrapment. However, he was impeached by his deposition testimony, in which he stated that he understood this hazard to include entrapment of any body part, including a leg (the manner in which plaintiff suffered his accident).

Hinson testified at trial that as he understood entrapment it could include the entrapment of a leg, and when he discussed Melton's report with him that possibility was mentioned. Examining the arch climber at that time, he could not see a possibility of head entrapment.

own initiative, he did not; all he did was to recommend to District headquarters that the entire structure be replaced within the next year under the District's 10-year master plan for all city parks. In the meantime, the equipment was left untouched and children were allowed to play on it as usual, without any warning of its hazards.[5]

On February 23, 1999, the 10-year-old plaintiff played on the arch climber. According to his undisputed testimony, as he descended the apparatus facing toward it and using all four limbs (a normal and reasonably foreseeable manner of playing on it), his left foot missed a rung and his leg fell into the space between two rungs. When he tried to extract it, his femur snapped. Sean Shimada, an expert on biomechanics called by the District, admitted that getting the leg caught in the space between the rungs caused plaintiff's femur to break; if the spacing had complied with the 1991 guidelines this scenario could not have occurred or, if it could, would have been less likely to produce a fracture.

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[5] One of plaintiff's experts testified that aside from immediately removing or fencing off the entire piece of equipment or removing the arch climber alone, it would have been possible to nail a piece of plywood onto the arch climber to close the gaps between rungs. Hinson and Melton testified they could not change or modify equipment without the manufacturer's approval and to do so might create more problems than it solved. However, neither sought Columbia Cascade's advice about the known dangers of the equipment before plaintiff's accident.

Plaintiff spent three days in the hospital, where he underwent surgery on the leg to insert screws, followed by eight weeks recuperating at home, including four weeks in a wheelchair wearing a cast; later he had a second surgery to remove the screws. He was in significant pain throughout that period, required home nursing care at a cost of $1,400, and could not attend school. Records produced by plaintiff and testified to by Joan Haradon, custodian of billing records for Kaiser Hospital, showed his medical expenses for the period February 23, 1999, to November 1, 2000, totaled $23,314.70.

DISCUSSION

I

The District contends the trial court erred by finding it liable for a dangerous condition of public property because it has absolute immunity from liability for any injury incurred by a participant in a "hazardous recreational activity." (§ 831.7.) We disagree. The District's claim of immunity is an affirmative defense on which the District had the burden of persuasion. (See *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 925-926 & fn. 3; Evid. Code, § 500.) As we shall explain, in this case, the District has failed to meet that burden.

The trial court's statement of decision reads as follows on this issue: "[] section 831.7 provides that a public entity is not liable to any person who participates in a hazardous

recreational activity when he knew or should have known the equipment presented a substantial risk of injury. Defendant

asserts, without reference to pertinent authority, that climbing on a piece of playground equipment is a hazardous activity for purposes of this statute. The court is not so persuaded. The described activity is not included in the specific definitions of the statute. The fact that there is always a risk of falling from a piece of playground equipment does not mean that playground equipment necessarily presents a 'hazardous recreational activity' as contemplated by the statute. Properly designed static playground equipment does not qualify as hazardous for purposes of the statute. Moreover, even if it did, there is ample evidence in the record that the injury-causing defect was not something that was easily discernible. There is no evidence that plaintiff knew of the defect. The fact that a child knows, or should know, that there is a risk of falling does not mean that the [10-year-old] plaintiff in this case should have known that there was a substantial risk of falling and having his leg entrapped in the rungs of the arch[] climber."

Section 831.7 provides as relevant: "(a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, . . . or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of

risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

"(b) As used in this section, 'hazardous recreational activity' means a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.

"'Hazardous recreational activity' also means: [a nonexclusive list of specific activities follows; using playground equipment is not among them].[6]"

The District asserts that the use of playground equipment in a normal and reasonably foreseeable manner is a hazardous recreational activity under section 831.7; however, its appellate briefs fail to support this assertion. As the

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[6] The enumerated activities fall into three groups: (1) "[w]ater contact activities, except diving," where lifeguards are not posted and a reasonable person should have known that there would be none on hand; (2) diving from any point other than a diving board or platform, or from any specifically prohibited place as to which warning has been given; and (3) a list of miscellaneous activities united by the vigor and obvious exposure to risk required, the use of obviously dangerous equipment, or both (animal riding, archery, bicycle racing or jumping, mountain bicycling [but *not* bicycling on paved roads and sidewalks], skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, "body contact sports," surfing, trampolining, tree climbing, tree rope swinging, waterskiing, white water rafting, and windsurfing). (§ 831.7, subd. (b)(1)-(3).)

District concedes, section 831.7 does not specifically list the use of playground equipment as a hazardous recreational

activity. The District cites no authority holding that the use of playground equipment "creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant" (*ibid.*), and we have found none. Finally, the District does not attempt to show through legislative history that the Legislature had the use of playground equipment in mind when it enacted section 831.7. We have independently examined the legislative history of the statute and have found no reference to playground equipment.

The District cites two cases, but neither is apposite.[7] The District's first case involved swinging from a fire hose hung from a tree, which the court found indistinguishable from "tree rope swinging," listed in section 831.7, subdivision (b)(3). (*DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272 & fn. 5.) The District's second case involved basketball, which the court found to be a "body contact sport"--also listed in section 831.7, subdivision (b)(3). (*Yarber v. Oakland Unified School Dist.* (1992) 4 Cal.App.4th 1516, 1519-1520.) These cases do nothing to establish that an activity not listed in the

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[7] The District asserts "there are any number of other 'hazardous recreational activity' cases that would indicate that the immunity should apply." If so, the District should have cited them. We are not required to take the District's word for it.

statute might fall within its general definition of a hazardous recreational activity.

Though we reject the District's position, we do not endorse all of the trial court's reasoning.

First, the court did not cite authority for the proposition "[p]roperly designed static playground equipment does not qualify as hazardous for purposes of the statute" and we have not found any such authority; nor can we presume this proposition true as a matter of law. Our review of the evidence indicates there is no support in the record for this conclusion.

Second, it is immaterial under section 831.7 whether plaintiff knew or should have known of the hazard because the statute applies that test only to a "spectator" to an activity. However, we must uphold a correct result even if the court's reasoning was not correct. "There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion. [Citation.]" (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568.)

We do not mean to imply that the District's argument is foreclosed as a matter of law.

Where a recreational activity is not expressly identified in section 831.7, the test of whether it is "hazardous" is whether the activity "creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury to a participant or a spectator." This determination requires factual determinations--most significantly whether participants are frequently injured while engaging in the activity. Where the facts surrounding a recreational activity are undisputed, and the hazardous nature of the activity is obvious, the question whether an activity is "hazardous" may properly be decided as a question of law by the court. (*Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 1307 [adult soccer game]; *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 476 [section 831.7 inapplicable to supervised gymnastic activity at school]; *Yarber v. Oakland Unified School Dist., supra,* 4 Cal.App.4th at p. 1519 [adult basketball game].)

Here, however, we frankly do not know whether children who play at public playgrounds are injured sufficiently frequently to make that activity "hazardous." The trial court opined the activity was not hazardous, but there is no evidence in the record to support that conclusion. At oral argument, the District contended the record contained evidence showing that the use of playground equipment creates a substantial risk of injury to a participant. Thus, the District cited to a trial exhibit, the 1997 edition of the CPSC "Handbook for Public Playground Safety," and in particular to a cover letter by the

CPSC's Chairman which states: "Unfortunately, more than 200,000 children are treated in U.S. hospital emergency rooms each year for injuries associated with playground equipment. Most injuries occur when children fall from the equipment onto the ground."[8] This evidence does not help the District.

First, the District's appellate briefs fail to cite this evidence or to base any argument on it. It is the appellant's duty to make arguments, supported by record citation, in its briefs. (Cal. Rules of Court, rule 14(a)(1)(B),(C).) A point first asserted at oral argument is waived. (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 32, fn. 2.) Any other rule would be unfair to the opposing party and the trial court.

Second, the District did not make any argument based on this evidence below in its trial brief. As we have noted, the claim of immunity under section 831.7 is an affirmative defense on which the District bore the burden of persuasion in the trial court. Because the District did not make any argument there based on the evidence it cited at oral argument, it did not give plaintiff the opportunity to litigate the significance of this evidence. Its mere presence in a trial exhibit, without more, did nothing to meet the District's burden.

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[8] The District also asserted that the 1997 Handbook itself contained similar evidence. We have not found such evidence at the pages the District cited.

But even if we could consider this evidence, it would not establish the District's point. Lacking any context (such as the number of children who use playground equipment every day), the bare statement that 200,000 children visit the emergency room each year due to playground equipment accidents tells little about the gravity of the risk.

The District also asserted at oral argument that the experts at trial agreed it is impossible to eliminate the risk of falling from playground equipment. Although this point does appear in the District's appellate briefing, it does not advance the District's case on this issue. The fact that some level of risk is unavoidable does not prove the risk is "substantial" within the meaning of section 831.7.

As we have mentioned, the evidentiary question whether playing on playground equipment generally creates a substantial risk of injury was simply not litigated in the trial court. We do not think that we should simply guess at the correct answer. Thus, we cannot say it is impossible that another litigant might offer sufficient evidence to show that the ordinary use of playground equipment creates a substantial risk of injury within the meaning of section 831.7. We conclude only that the District has not done so in this case, even though it had the burden to establish this affirmative defense.[9]

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[9] In light of this conclusion, we need not decide whether liability might still exist on these facts, even if the use of playground equipment were deemed a hazardous recreational

II

The District contends the trial court erred by rejecting its alternative defense that assumption of the risk barred plaintiff's action. We disagree.

On this point, the trial court found as follows: "Participants in athletic activities assume the risks inherent in the sport. (*See Knight v. Jewett* (1992) [3] Cal.4th 296[.]) They do not assume risks created or increased by the defendant. Even assuming that there is an inherent risk of injury from climbing on static playground equipment and that the [10-year-old] plaintiff assumed that risk, he did not assume the increased risk of the serious injury that occurred as a result of the dangerous condition of the property. Where, as here, a defendant increases the risk of injury, it cannot hide behind the defense of assumption of the risk. Primary assumption of the risk has no application to the facts of the instant case."

Knight v. Jewett, supra, 3 Cal.4th 296, held that where "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury," (*id.* at pp. 314-315) "primary assumption of the risk" will bar a plaintiff's recovery for injury due to

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activity, under the following statutory exemption from immunity: "Failure of the public entity or employee to guard or warn of a known dangerous condition . . . that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose." (§ 831.7, subd. (c)(1).)

"risks inherent in [*a*] *sport*"; however, the defendant has "a duty to use due care not to increase the risks to a participant over and above those inherent in *the sport*." (*Id.* at pp. 315-316, italics added; see also *Knight v. Jewett*'s companion case,

Ford v. Gouin (1992) 3 Cal.4th 339, 342 [injury arising out of negligence of coparticipant in *active sport*].)

The District asserts that the risk plaintiff incurred was inherent in his activity because (1) a child always risks slipping and falling on playground equipment, and (2) any piece of equipment into which a body part can be inserted poses the inherent risk that the body part will be caught if the child slips and falls. According to the District, no matter how the rungs of an arch climber are spaced, a child could conceivably slip, fall, and catch a limb between the rungs as plaintiff did. Therefore, the District concludes, because this risk is inherent and unavoidable in the use of arch climbers, *Knight v. Jewett, supra*, 3 Cal.4th 296 bars plaintiff's action as a matter of law. We are not persuaded.

Under the doctrine of assumption of the risk, before we could reach the District's claim that it did not increase plaintiff's risk, we would have to conclude first that plaintiff was engaged in a sport; otherwise the doctrine does not apply.[10]

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[10] In its reply brief the District asserts that *Knight v. Jewett, supra*, 3 Cal.4th 296, and subsequent decisions have not restricted assumption of the risk to "sporting *contests*." (Italics added.) We agree, but that does not help the District.

Not only does *Knight v. Jewett, supra*, 3 Cal.4th 296, expressly speak of sports (as does its companion case, *Ford v. Gouin, supra,* 3 Cal.4th 339), but so do all the other cases the

District cites. (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 115-117 [skateboarding, held a sport]; *Record v. Reason* (1999) 73 Cal.App.4th 472, 482 [inner tube riding while towed by motorboat, held a sport]; *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 943 [wrestling]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1115-1117 [gymnastic stunt performed in cheerleading]; *Mosca v. Lichtenwalder* (1997) 58 Cal.App.4th 551, 553-554 [sportfishing]; *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 251-252 [white water rafting]; *O'Donohue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188, 191 [skiing].) Not every kind of childish play qualifies as a sport. Absent authority on point, we cannot conclude that the use of playground equipment automatically does so.

But even assuming plaintiff was engaged in a sport, we would still uphold the trial court's finding that plaintiff did not assume the risk. As the court pointed out, assumption of risk does not apply where the defendant's conduct increased the risk inherent in the activity. (*Knight v. Jewett, supra,* 3 Cal.4th 296, 315-316.) The court correctly found that the District did so. Even the District's biomechanics expert, Sean

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Its burden was to show plaintiff was engaged in a sport, regardless of whether the sport was also a contest.

Shimada, conceded that the arch climber's noncompliance with the 1991 guidelines made it more likely that if a child slipped and fell, he would suffer the sort of injury plaintiff did. The District knew of this hazardous violation four months before plaintiff's accident, yet did nothing to correct it or warn against it. This conduct increased the risk inherent in using an arch climber.

III

The District contends the trial court erred in concluding that the spacing of the rungs on the arch climber created a reasonably foreseeable risk of the kind of injury that occurred. Again, we disagree.

Unlike the District's other contentions, this one attacks the trial court's primary finding that the arch climber constituted a dangerous condition of public property that caused plaintiff's injury. Under the controlling statute, liability will lie if (among other things) the dangerous condition "created a reasonably foreseeable risk of the kind of injury which was incurred." (§ 835.) Thus, the District argues in effect that substantial evidence does not support an element of plaintiff's cause of action.

Whether a dangerous condition of property giving rise to liability existed is normally a question of fact for the trial court, reviewed on appeal under the substantial-evidence standard. (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810; *Schonfeldt v. State of California*

(1998) 61 Cal.App.4th 1462, 1465; *Campbell v. City of Palm Springs* (1963) 218 Cal.App.2d 12, 23 [former Public Liability Act].) To establish that the injury-causing risk created by the dangerous condition was reasonably foreseeable, the plaintiff need show only that the general character of the event or harm

was foreseeable, not that the precise nature of the accident was so. (*Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1474; see *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58.) The District does not argue that we should apply any standard of review other than substantial evidence, and we do not see any reason to do so. We therefore set out the trial court's findings on this issue and examine them in light of the substantial-evidence standard.

The trial court found: "Defendants contend that plaintiff's injury was not the kind of injury that the guidelines were designed to prevent. They contend that the risk of injury from the space between the rungs was a risk of head entrapment, not of limb entrapment. Defendants' contention lacks merit. Defendants' [*sic*] rely on the 1981 guidelines for their contention. It is true that the 1981 provision on which plaintiff relies is addressed to the risk of head entrapment. However, the 1991 guidelines' definition of the word entrapment includes 'any condition that impedes withdrawal of a body or bodily part that has penetrated an opening.' . . . The guideline for arch[] climbers is designed to prevent entrapment as defined in the guidelines. Also, witnesses Melton and Hinson testified

in videotaped depositions that, in the case of an arch ladder, the risk of injury would most likely be to a leg. This evidence is sufficient to establish that the type of injury that occurred as a result of the dangerous condition was reasonably foreseeable."

The District asserts that, contrary to the trial court's finding, the 1991 guidelines did not shift the focus from head entrapment to entrapment per se; rather, both sets of guidelines, correctly understood, spoke only to head entrapment. In support of this argument, the District calls our attention to the 1981 and 1991 guidelines, found in the record, and asks us in effect to review them for ourselves. We will not do so.

As we have noted (see fn. 3, *ante*), the trial court resolved this issue after considering voluminous and conflicting expert testimony on this highly technical subject. Under the substantial-evidence standard of review, we may not reweigh that evidence. (See, e.g., *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) And, as mentioned, the District has not given any reason why we should review this or any other issue in the case de novo.

But even if we agreed with the District that the guidelines addressed only head entrapment, we would reject the District's claim of error. Plaintiff did not have to show that the precise manner in which his accident occurred was reasonably foreseeable; he had to show only that the general nature of the event or harm was so. (*Constantinescu v. Conejo Valley Unified*

School Dist., supra, 16 Cal.App.4th 1466, 1474.) The guidelines indicated, and the District's employees found, that the arch climber presented a life-threatening hazard of "entrapment"; thus, an accident in which entrapment caused serious injury was reasonably foreseeable.

The District protests the trial court's reliance on the videotaped deposition testimony of Melton and Hinson about the likelihood of injury to a child's leg. The District notes that it moved unsuccessfully to exclude that testimony, calling it purported expert opinion those witnesses were not qualified to give on a topic on which they had not been offered as experts. We conclude the trial court properly relied on this testimony.

The District's claim of evidentiary error is arguably waived because the District has not raised it under its own argument heading. (Cal. Rules of Court, rule 14(a)(1)(B); O*pdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) But even if not waived, it lacks merit.

Melton's testimony on this point did not come in as expert opinion testimony: it came in to impeach his trial testimony that he perceived a hazard only from head entrapment. The record is not clear as to Hinson because the part of his deposition played at trial was not transcribed; however, the District did not object to that evidence at the time, and the District does not cite to the record to show it had made a continuing objection. Thus, so far as the District asserts Hinson's deposition was improperly admitted (and, impliedly,

that it did not waive its objection), it has not given us a record sufficient to assess this contention.

In any event, both employees were certified playground inspectors, which meant that they had passed a course on how to apply the CPSC guidelines to inspect playground equipment. Their training qualified them to testify on what the guidelines had to say about specific hazards, including the possibility of any particular injury arising from them. They could not properly testify about how the guidelines were developed or what their authors might have had in mind, but they did not do so, and all parties offered properly qualified experts to testify on those topics. In short, we see no error in the trial court's admission and use of Melton's and Hinson's testimony about the likelihood of leg injury on the arch climber.

Substantial evidence supports the trial court's finding that the injury which occurred was a reasonably foreseeable risk produced by the dangerous condition of the arch climber.

IV

The District contends the trial court erred by awarding plaintiff damages of $23,364.70 for medical expenses. According to the District, plaintiff failed to adduce admissible evidence to prove those expenses, and the judgment should therefore be reduced by that amount. We disagree.

To prove his medical treatments, plaintiff offered Kaiser Hospital records and the deposition testimony of the treating

physician. The District does not contend this evidence was improperly admitted.

To prove the costs of his treatments, plaintiff offered Exhibit 24, a computer-generated document titled "Consolidated Statement of Benefits." The document bears the name of Healthcare Recoveries, Inc., a Kentucky corporation, at the top, plaintiff's name as the patient, "Kaiser Permanente CA Division" as the patient's health plan, and the dates, nature, and costs of services provided to plaintiff.

To authenticate Exhibit 24 as a business record (Evid. Code, § 1271), plaintiff produced Joan Haradon, manager of patient business services and "custodian of billing records" for Kaiser Hospital. Haradon testified that Healthcare Recoveries has a contract with Kaiser to generate billing records on receipt of computer-coded treatment information from Kaiser. The medical records, though generated at the time of treatment by hospital staff, are not immediately forwarded to Healthcare Recoveries; rather, Kaiser forwards them when it receives a request from an attorney, a member, or a patient to produce a bill. Kaiser develops the computer-coded information it sends to Healthcare Recoveries based on a fee schedule Kaiser produces to set fees for services to nonmembers. The costs shown on the "Consolidated Statement of Benefits" for the services plaintiff received would be the fees charged to any Kaiser nonmember in the Sacramento area for those services under the fee schedule.

Defendants objected to Exhibit 24 before and after Haradon finished her testimony, asserting: (1) Exhibit 24 was not a business record of Kaiser because it had not been prepared by Kaiser at or near the time of the services rendered and because it was prepared in contemplation of litigation; (2) it had not been shown that the fees reflected in Exhibit 24 were reasonable. The trial court overruled defendants' objections and admitted Exhibit 24 into evidence. The court thereafter

based its award of medical damages on this evidence without making any express response to defendants' objections in the statement of decision.

The District renews the objections raised below. As we explain, they lack merit.

Evidence Code section 1271

Evidence Code section 1271, the business records exception to the hearsay rule, provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

In deciding whether sufficient evidence has been adduced to qualify a computer-generated document as a business record, the trial court has wide discretion, and only a showing of abuse of discretion justifies overturning the court's ruling. (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797; *People v. Lugashi* (1988) 205 Cal.App.3d 632, 638-689.) We conclude the District has not made any such showing.

Haradon testified as to all points required under Evidence Code section 1271. She showed that Exhibit 24 was made in the regular course of Kaiser's business, in the sense that Kaiser regularly generates the information necessary to produce billing records such as Exhibit 24 and regularly furnishes that information to the contractor which created the records. The medical information which produced the computer coding provided to the contractor was made at or near the time of plaintiff's treatment, as it would be for any such billing record. As custodian of Kaiser's billing records and manager of patient business services, Haradon was qualified to testify to the identity of Exhibit 24 and the mode of its preparation. Based on that testimony, the trial court reasonably found Exhibit 24 to be trustworthy evidence of what it purported to show.

The District asserts Exhibit 24 was not made in the regular course of business (Evid. Code, § 1271, subd. (a)) because it was prepared in connection with litigation at the request of

counsel. The District relies only on the following quotation from a treatise: "[A] report prepared for litigation . . . is not looked on as having been made in the regular course of business because it is prepared for use primarily in court, not in the business itself." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Business Records, § 4.7, p. 114.) However, when the language the District has deleted is restored, the full sentence reads: "[A] report prepared for litigation, *such as an accident report prepared by a business that might become a party to litigation as a result of an accident on its premises,* is not looked on as having been made in the regular course of business [etc.]." (*Ibid.*, italics added.) Exhibit 24 is not such a self-serving document: it was prepared by Kaiser's contractor, not a party to this litigation, for Kaiser, also not a party to this litigation, using information supplied by Kaiser. Furthermore, although Exhibit 24 was produced at counsel's request, Haradon testified that such records are not produced *only* for litigation, but are prepared on request of any patient or member; thus the evidence is not a suspiciously unique ad hoc document, like Jefferson's hypothetical example.

The District asserts Exhibit 24 was not made "at or near the time of the act, condition, or event" (Evid. Code, § 1271, subd. (b)), because it was produced not when the underlying medical records were created, but long afterward. However, "[the District] cites no authority holding that the retrieval, rather than the entry, of computer data, must be made at or near

the time of the event." (*Aguimatang v. California State Lottery, supra,* 234 Cal.App.3d at p. 798.) Plaintiff's medical records, from which the computer coding provided to the contractor was generated, were made at or near the time of plaintiff's treatment. Moreover, nothing in Haradon's testimony suggests that the time lapse between Kaiser's production of medical records and Kaiser's transmittal of the coded records to its contractor could make the transmitted information unreliable.

Finally, the District asserts Haradon's testimony did not satisfy Evidence Code section 1271, subdivisions (c) and (d), because Haradon could not "really" testify to Exhibit 24's mode of preparation or source of information: it was prepared by a separate entity in Kentucky, there was no showing Haradon is familiar with the inner workings of that entity, and her testimony did not exclude the possibility of internal error, either in Kaiser's business office or at the Kentucky entity. The District again relies solely on Jefferson's treatise, which it quotes as follows: "One important test to determine the reliability of the sources of information for a business record is whether the facts in the written record are based on the personal knowledge of the recorder or writer as the owner or employee of the business, or on the personal knowledge of some other employee of the business who has a business duty to observe facts accurately and report them accurately to the recorder-employee who makes the entries in the record.

Generally, if this is not the case, the business record involved is not considered trustworthy hearsay and is not admissible under the business-records exception to the hearsay rule." (1 Jefferson, Cal. Evidence Benchbook, *supra*, § 4.9, p. 115.) We are not persuaded.

First, the District has again ignored pertinent matter from its chosen authority. In the paragraph just before the one the District quotes, Jefferson's treatise states: "Many business records are prepared through the activities of several persons.

Thus, one employee may report facts that he or she knows to a second employee who has the job of typing the writing, which then is placed in the files. Although the custodian is not required to testify, there must be testimony from some knowledgeable witness who identifies the writing as the writing of X Corporation, for example, and, in addition, testifies regarding the various steps involved in the preparation of the writing." (1 Jefferson, Cal. Evidence Benchbook, *supra*, § 4.9, p. 115.) Haradon's testimony more than satisfied these conditions. The actual custodian of Kaiser's billing records, Haradon identified Exhibit 24 as the writing of Kaiser's contractor and testified as to the steps involved in its preparation.

Second, the District overlooks relevant case law. In *People v. Lugashi, supra,* 205 Cal.App.3d 632, the court responded to attacks on computer-generated records, similar to the District's arguments, as follows: "Appellant's proposed

test[, which would require the proponent of computer evidence to prove the reliability of the hardware and software used, plus evidence of internal maintenance and accuracy checks,] incorrectly presumes computer data to be unreliable, and, unlike any other business record, requires its proponent to disprove the possibility of error, not to convince the trier of fact to accept it, but merely to meet the minimal showing required for admission. If applied to conventional hand entered accounting records, appellant's proposal would require not only the

testimony of the bookkeeper records custodian, but that of an expert in accounting theory that the particular system, if properly applied, would yield accurate and relevant information.

"[¶] . . . [¶]

"Finally . . . , appellant's proposal could require production of a horde of witnesses representing each department of a company's data processing system, not to rebut an actual attack on the reliability of their data, but merely to meet the minimal requirement for admissibility. . . . The time required to produce this additional testimony would unduly burden our already crowded trial courts to no real benefit. . . . Especially where, as here, the business producing the records is neither party to the litigation nor interested in the outcome, common sense compels rejection of such a requirement." (*Id.* at pp. 640-641.)

For all the above reasons, the District's attack on the admissibility of Exhibit 24 as a business record fails.

Evidence of actual and reasonable costs

Although invoices and bills are hearsay and inadmissible to prove independently that payments were made or charges were reasonable, they may be used to corroborate evidence that a liability for payment was incurred. If payment was made, the testimony and documents are also evidence the payment was reasonable. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.)

Plaintiff, his guardian ad litem, and his treating physician testified as to his injury and treatment, and his medical records were introduced into evidence. Thus, Exhibit 24 corroborated this evidence that plaintiff incurred a liability for payment.

Contrary to the District's assertion, plaintiff also showed payment was made. His guardian ad litem testified that plaintiff and his family belonged to Kaiser's health plan, which paid all the bills for his treatment. Defendants did not put on any contrary evidence.

Thus, under the rule of *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra*, 69 Cal.2d at pages 42-43, and *Jones v. Dumrichob, supra*, 63 Cal.App.4th at page 1267, Exhibit 24 tended to establish that the charges it showed were reasonable. It is immaterial that plaintiff did not offer the testimony of a doctor to establish the reasonableness of the charges, as the District asserts. (Furthermore, the District

does not explain why a doctor would be qualified to do so.) For the same reason, we need not decide whether the District is correct in asserting Haradon was not qualified to opine that the charges were reasonable.

The trial court impliedly found that Exhibit 24 constituted at least a prima facie showing of the amount and reasonableness of the charges. The District did not put on any evidence to controvert this showing. Thus it is ill-placed to complain that the court accepted plaintiff's evidence.

The District has shown no abuse of discretion in the trial court's award of medical damages.

V

The District, joined by plaintiff, contends the trial court erred by exonerating Columbia Cascade from strict liability for the defective design of the arch climber.[11] Columbia Cascade has submitted a perfunctory and unhelpful brief in response.[12]

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[11] Plaintiff pleaded in the alternative that Columbia Cascade was strictly liable for failure to warn of the dangerous condition. The trial court found in Columbia Cascade's favor on that theory as well. No party has challenged that aspect of the judgment on appeal.

[12] Columbia Cascade makes two arguments, neither raised under a proper heading (Cal. Rules of Court, rule 14(a)(1)(B)): (1) The evidence was sufficient to support the judgment. (2) Res judicata bars the District's contention. These arguments lack merit.

Defendant's substantial evidence argument does not respond to appellant's argument that the trial court committed legal error. And a trial court judgment on which a timely-filed appeal is pending does not have res judicata effect because it

However, our independent review reveals that the judgment should be affirmed.

Preliminarily, we note that plaintiff has filed no appeal nor cross-appeal from the judgment. Accordingly, plaintiff cannot attack this portion of the judgment. (Cal. Rules of Court rules 1(a) and 1(e); *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625; *In re David K.* (1978) 79 Cal.App.3d 992, 1003.)

This leaves the District's claim for implied equitable indemnity.

The trial court reasoned as follows on this issue: "For purposes of strict liability a product must be defective in design when it leaves the manufacturer. The product is defective in design *when the foreseeable risks of harm posed by the product could have been reduced or avoided*, and the omission of the alternative design renders the product not reasonably safe.

"Defendant Columbia Cascade contends that the arch[] climber was not defective when it was manufactured and installed because it complied with the US consumer guidelines in effect at the time. The contention has merit. The weight of the evidence is that the arch[] climber in question complied with [the 1981 CPSC guidelines]. . . . *The fact of compliance with the guidelines is not in and of itself dispositive of the issue of*

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is not final. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 307, p. 857.)

whether the product was defective at the time it left this defendant. However, the guidelines provide substantial evidence as to this issue. There was no evidence presented that would lead to a determination that at the time of manufacture the risks that were discovered subsequently were reasonably foreseeable. The evidence that later regulations changed the standards does not mean that the product was defective in 1988. At the time of manufacture and installation, the arch[] climber was not defective." (Italics added.)

The District contends the trial court's legal reasoning was erroneous. We have no need to resolve this claim because, even assuming Columbia Cascade could be strictly liable on a theory of design defect, the District would not be entitled to equitable indemnity on this record.

Our Supreme Court has summarized the law of equitable indemnity as follows:

"We begin our examination of the issue at hand with a brief overview of the governing principles: California's doctrine of equitable or implied indemnification is a development of the common law, first applied by this court in *City & County of San Francisco v. Ho Sing* (1958) 51 Cal.2d 127. There, we held that the city had a right to recover from a property owner the amount paid a third party injured due to the property owner's negligent alteration to the city's sidewalk. (*Id.*, at p. 138.) Although the city had primary responsibility under the Public Liability

Act of 1923 for maintaining the sidewalk in a safe condition, the adjoining property owner created the particular hazard for his own benefit. This disparity in the relative culpability justified allowing the city to recoup from the more actively negligent wrongdoer. (*Id.* at pp. 131-135.)

"At the time it entered our common law, indemnity permitted one tortfeasor to shift the entire burden of loss incurred by judgment or settlement to another tortfeasor. '"It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay

damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable."' (*Alisal Sanitary Dist. v. Kennedy, supra,* 180 Cal.App.2d at p. 75.) Distinctions between 'active' and 'passive' fault, 'primary' and 'secondary' liability, and similar characterizations of the relationship between or among concurrent tortfeasors served as the theoretical underpinnings of equitable indemnification and guided its application. (See *Ford Motor Co. v. Robert J. Poeschl, Inc.* (1971) 21 Cal.App.3d 694, 696-697.) At the same time, courts often frankly admitted that the standard was vague and imprecise: 'No one explanation appears to cover all cases.' (*Herrero v. Atkinson* (1964) 227 Cal.App.2d 69, 74; *Atchison, T. & S.F. Ry. Co. v. Lan Franco* (1968) 267 Cal.App.2d 881, 886; see also *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 594, fn. 4 [*AMA*]; Prosser & Keeton, Torts (5th ed. 1984) § 51, pp. 343-344.)

"Nevertheless, the restitutionary nature of indemnification clearly emerged as a common thread. 'The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay. . . . As [stated] in the Restatement of Restitution: "A person is enriched if he has received a benefit. . . . A person is unjustly enriched if the retention of the benefit would be unjust. . . . A person confers a benefit . . . not only when he adds to the property of another, but also when he saves the

other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage." [Citation.]' (Rest.2d Torts, § 886B, com. c, pp. 345-346; see *Atchison, T. & S.F. Ry. Co. v. Lan Franco, supra,* 267 Cal.App.2d at pp. 885-886; *Herrero v. Atkinson, supra,* 227 Cal.App.2d at p. 74.)

"Notwithstanding its equitable character, implied indemnity necessarily operated as an all-or-nothing shifting of loss, and thus did not always rectify the injustice at which it aimed. (See *Ford Motor Co. v. Robert J. Poeschl, Inc., supra,* 21 Cal.App.3d at p. 699.) In the wake of *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, this court recognized the need to reevaluate the concept and to conform its application to principles of comparative fault. Accordingly, 20 years after its incorporation into state law, we concluded 'that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial

indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis.' (*AMA, supra,* 20 Cal.3d at p. 583)." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 107-109.)

In this case, the record demonstrates that Columbia Cascade was without fault and the District was highly culpable in causing plaintiff's injuries.

Thus, abundant evidence supports the trial court's express finding that, at the time Columbia Cascade delivered the arch climber to the District in 1988, the climber's design complied with the CPSC guidelines for safety of playground equipment.

On the other hand, after the CPSC design criteria were changed in 1991, District Park Supervisor Melton in 1998 reported that improper spacing between the rungs of the arch climber could be dangerous. He recommended the equipment be removed as soon as possible. But his supervisor, Hinson, declined to remove the equipment and chose rather to replace the equipment the next year under the District's 10-year master plan. The record thus demonstrates the District allowed the dangerous condition to exist apparently for budgetary reasons. This is highly culpable conduct.

This record tenders no basis upon which equitably to shift any part of the cost of plaintiff's injuries from the District to Columbia Cascade. Columbia Cascade has not been unjustly enriched at the expense of the District. (*Western Steamship*

Lines, Inc. v. San Pedro Peninsula Hospital, supra, 8 Cal.4th at pp. 108-109.) Therefore, even had the trial court found that Columbia Cascade was strictly liable without fault to plaintiff for his injuries (see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560), the trial court would have erred had it shifted responsibility for any of those injuries from the District to Columbia Cascade. The trial court therefore did not err in entering judgment for Columbia Cascade on the District's cross-complaint for equitable indemnity.

DISPOSITION

The judgment is affirmed. Plaintiff Clark and defendant Columbia Cascade shall recover their costs on appeal from the District.

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

RAYE, J.